EX PARTE OR LATE FILED

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	**PP Docket No. 93-253**
of the Communications Act -	)	
Competitive Bidding	)	
	)	
Amendment of the Commission's	)	**GN Docket No. 90-314**
Cellular-PCS Cross-Ownership Rule	)	
	)	
Implementation of Sections 3(n)	)	
and 332 of the Communications Act	)	**GN Docket No. 93-252**
Regulatory Treatment of Mobile	)	
Services	)	

To: The Commission

MOTION TO STRIKE
"RESPONSE OF COOK INLET REGION, INC."

The Sovereign Nation of the Oneida Tribe of Wisconsin ("Oneida Tribe"), by its attorneys, submits this Motion to Strike the "Response of Cook Inlet Region, Inc." ("Response"), submitted in the referenced proceedings on July 12th, 1995.

The Response of Cook Inlet Region, Inc. ("CIRI") is submitted in disregard of the Commission's announcement that reply comments to its Further Notice of Proposed Rule Making, adopted and released on June 23, 1995, would not be entertained. The excuse for ignoring this announcement is "to clarify the record with regard to the unusual matters raised by the Oneida Tribe." (Response @ n.2)

The Response does far more than "clarify" the record. It demonstrates that the procedural processes of the Commission in adopting a specific rule of eligibility were violated and possibly corrupted. The rule at issue, that the existence of gaming revenues creates a rebuttal presumption

of unfair competitive advantage in the entrepreneurs' block C PCS auctions, directly and adversely affects the Oneida Tribe's eligibility to participate in the upcoming auction. Conversely, the rule does not affect its sole proponent, CIRI, and actually provides CIRI with a significant advantage in that CIRI is not restricted in any manner from using its far more vast resources, in excess of $600,000,000.00, from participating in the same auctions.

In comments submitted July 7, 1995, in response to the Further Notice of Proposed Rulemaking issued by the Commission in response to the Supreme Court's decision in Adarand, the Oneida Tribe made a compelling case that hanging the burden of a "rebuttal presumption" that gaming revenues will provide an unfair competitive advantage in the auctions is neither defensible on any cogent economic or legal grounds, nor as sound public policy. Indeed, the Oneida comments demonstrate that the premises on which the presumption of unfair advantage was based is contrary to fact, law and simply unfair.

It is all the more astounding that the sole document relied on by the Commission in adopting its restrictive role for the use of gaming revenues is not available as part of the official record of proceedings. Searches of the Commission's official docket by Oneidas' attorneys, the Commission's records contractor and the Commission's staff all confirmed that the document is **not** part of the official record of the docket. Yet, that document is cited several times and is the only citation made in the Fifth Memorandum Opinion & Order released November 23, 1994, in support of the restrictive treatment given gaming revenues.

Confounding the issue further is the fact that a formal Freedom of Information Act request produced the response that the document could not be found. Further still, the Commission's own

Wireless Telecommunications Bureau has failed to locate the document and could not, therefore, verify its existence.

Only now has a copy of the document been submitted to the Commission. On July 12, 1995 in the Response, CIRI's attorneys submitted the document for the first time. But this belated filing does far more than shed light on the unusual circumstances surrounding the use of the document as basis for adoption of the gaming revenues restriction. The belated filing raises a most serious question about the propriety of its use by the Commission and the Commission's reliance on it to adopt the gaming revenues restriction.

First the July 12th filing admits that a violation of the Commission's ex parte rules occurred. After alluding to the creation of the sole document relied on by the Commission in adopting its gaming revenue restrictions on eligibility, CIRI "explains"

> CIRI does not believe that any of its employees or representatives delivered the document to the Commission at any time. However, CIRI cannot determine with certainty that this is the case. If the October 31 document was delivered to the Commission by a CIRI employee or representative, the failure to file an ex parte presentation notice was inadvertent. (Response @ 2-3)

CIRI's July 12th filing next makes the astounding assertion that the Commission's reference in the Fifth Memorandum Opinion & Order to the date of Congressional action on the Indian tribal exception to the SBA's affiliation rule "is a typographical error."

> Notwithstanding the Oneida Tribe's assertion to the contrary, the subject document correctly notes that the tribal exception to the Small Business Administration's affiliation rules was enacted by Congress in 1990. **The reference to the year 1970 in the** Fifth Memorandum Opinion & Order **is a typographical error.** (Response @ n. 6; Emphasis in bold added.)

What is so astounding about this assertion is the appearance it creates of direct participation by Cook Inlet and/or its representatives in the internal deliberations and drafting of

the Fifth Memorandum Opinion & Order by the Commission on gaming revenues. Further, CIRI simply ignores the overridingly important substantive fact that the Commission's conclusion about the lack of Congressional knowledge of the existence of gaming revenues was clearly erroneous based from all appearances on the erroneous reference to the year 1970 in the Fifth Memorandum Opinion & Order. The Commission's error belies CIRI's attempt to diminish this sorry performance as a clerical "typo."

The filing on July 12, 1995 not only comes too late to correct the serious procedural infirmity its absence from the official record has created, it compounds the breach of fair procedure that has occurred and raises the specter of actual corruption of the Commission's processes. First, the document is unsigned and undated and bears no hint as to who authored it or on what basis its authorship was attributed to the entity cited by the Commission in the Fifth Memorandum Opinion & Order as having authored it. Second, in the Oneida Tribe's comments submitted July 7th, the Commission has been supplied with ample justifications, facts, arguments and law, that the restrictions on reliance on gaming revenues is unjustified and insupportable.

Third, no one had an opportunity, prior to having to submit comments on July 7th, to examine the one "record" on which the Fifth Memorandum Opinion & Order relied to create the offending gaming revenues restriction. CIRI's self-serving assertions notwithstanding (Response @ 3), the Oneida Tribe is severely prejudiced by the gaming revenues restriction. Hypocritically arguing procedural regularities, CIRI criticizes the Oneida Tribe's lack of earlier participation in the reconsideration of the Fifth Memorandum Opinion & Order in its efforts to change an indefensible rule which arbitrarily and capriciously harms its participation in the entrepreneurs' block C PCS auction.

The simple fact is that the Oneida Tribe was not presented with a realistic opportunity to consider its participation until well after the time had passed to seek reconsideration of the Fifth Memorandum Opinion & Order. The impossibility of the Oneida Tribe's earlier participation is irrelevant in any event. A rule improperly adopted and based on improper ex parte contacts, the effects of which are to deprive a party of substantive rights and which, as applied, conflicts with both FCC and Congressional policy, cannot be defended nor retained on any basis, least of all on a timeliness issue.

Fourth, no one had an opportunity to examine the document at any time during the Commission's consideration of its affiliation rules because the document was not properly made part of the record and now seems to have been inexplicably kept from the record.

CIRI's gratuitous statement that the Oneida Tribe is not harmed because it may seek a waiver is disingenuous. No party is required to seek waiver of a rule, the substantive content of which is inherently arbitrary and capricious and for which the procedures used for its adoption are shown to have been inadvertently or intentionally corrupted. Moreover, the use of the "rebuttal presumption" or "waiver" routine begs the question. Such a suggestion disregards the unfair competitive disadvantage imposed on an applicant whose successful bids are subject to frivolous post-bidding challenge. Already, block C aspirants have complained about the unfairness of the block A and B PCS licensees' headstart in the marketplace. Subjecting the Oneida Tribe's winning bids, or any party's, to the delays inherent in post-bidding challenges only compounds the unfairness of the necessity to enter the market after much larger competitors have already done so.

The Response of CIRI should be stricken from the record of this proceeding. Its filing now offends due process and condones what may, upon proper investigation, be shown to involve a corruption of Commission processes. Moreover, from a substantive point of view, with or without the document, there is no justification for depriving Native Americans of eligibility to participate in such a significant economic opportunity because of their access to a certain type of revenue.

There is no public interest basis for the continuation of the regulatory stigma on gaming revenues presently contained in the Commission's rules. More to the point, consideration of all the circumstances surrounding the adoption of this stigma strongly suggests that it would be unwise and counterproductive to ignore the unjust impact continuing such artificial and arbitrary restriction would create. That stigma must be removed if the full and rightful participation of Native Americans in the entrepreneurs' Block C PCS licenses is to be assured as Congress and sound public policy dictate.

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In conclusion, the Commission should strike the Response and order its Inspector General's office to investigate the circumstances detailed in CIRI's Response.

Respectfully submitted,

The Sovereign Nation of the
Oneida Tribe of Indians of Wisconsin

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Dated: July 13, 1995

CERTIFICATE OF SERVICE

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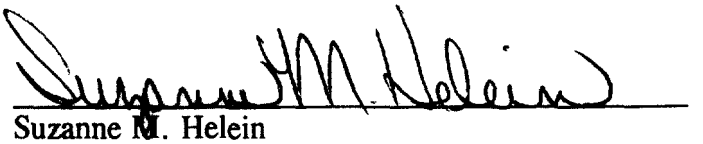

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